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No. 02-1717

IN THE

# Supreme Court of the United States

JUAN HERNANDEZ,

*Petitioner,*

*v.*

CRAWFORD BUILDING MATERIAL COMPANY, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS EAST BATON ROUGE PARISH SCHOOL BOARD, INDIVIDUAL SCHOOL BOARD MEMBERS & JAMES MANLEY

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## STATEMENT OF THE CASE

### A. Course of the Proceedings.

Petitioners filed suit in the instant matter on November 18, 1998 against Respondents, the East Baton Rouge Parish School Board, each individual member of the Board, as well as James Manley, a Supervisor of Human Resources (all hereinafter collectively referred to as "School Board"). In their complaint, Petitioners alleged they suffered disparate impact discrimination on the basis of their gender in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, the Civil Rights Act of 1964, as amended, when the School Board created a new janitorial position with attendant job qualifications and salary changes. Petitioners also claimed the actions of the School Board were retaliatory under both Title VII and 42 U.S.C. § 1983 because of their having engaged in prior protected activity.

The School Board moved for dismissal of Petitioners' claims in a Federal Rule of Civil Procedure 12(b)(6) motion arguing that Petitioners had failed to allege a separate constitutional or statutory basis (other than Title VII) for their position that the School Board had violated their rights pursuant to § 1983. The motion to dismiss was also based on the right of the individual School Board member defendants and Mr. Manley to qualified immunity from liability. Thereafter, the District Court denied the School Board's motion to dismiss on all grounds finding that claims of sex discrimination have been found to be violative of the Fourteenth Amendment to the U.S. Constitution and that this would be sufficient to serve as a separate constitutional basis for Petitioners' § 1983 claims.[1]

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1. The School Board also filed a Motion for Summary Judgment regarding Petitioners' collateral attack on a Consent Decree. The District Court denied that motion as well.

Following the conclusion of discovery, the School Board filed three (3) motions for summary judgment. The motions separately addressed (1) Petitioners' claims under Title VII, (2) the right of three (3) specific employees to pursue claims against the School Board, and (3) the right of the individual defendants to qualified immunity. The District Court, after considering all the evidence presented, ruled on June 5, 2001 that Petitioners failed to present proof sufficient to create a genuine issue of material fact as to their claims under Title VII for retaliation and disparate impact discrimination. The Court then dismissed Petitioners' suit in its entirety. (Pet. App. pp. 62a-75a).

Later, on June 25, 2001, the District Court amended its order and acknowledged Petitioners' remaining claim against the School Board under § 1983. The District Court then *sua sponte* ordered the parties to present briefs for its review in consideration of possible dismissal of Petitioners' claims under that statute. On December 14, 2001, the Court dismissed Petitioners' claims under § 1983 for the same reasons it gave for the dismissal of their claims under Title VII. (Pet. App. pp. 51a-60a).

Petitioners then appealed the dismissal of their claims under Title VII and § 1983 to the United States Fifth Circuit Court of Appeals. On February 19, 2003, the Fifth Circuit affirmed the district court's decision in all regards. The Fifth Circuit held that Petitioners had failed to establish a *prima facie* case of retaliation under either Title VII or § 1983 and that Petitioners had also failed to establish a *prima facie* case of disparate impact discrimination. *Banks v. East Baton Rouge Parish School Board*, 320 F.3d 570 (5th Cir. 2003) (Pet. App. pp. 30a-50a). Petitioners have now applied for writs to this Court seeking review of only the Fifth Circuit's ruling with regard to their claims of retaliation under Title VII and § 1983.

**B. Statement of Facts.**

As the Fifth Circuit acknowledged in its opinion, the facts of this case are "unique." 320 F.3d at 572 (Pet. App. p. 32a). There are also very few, if any, contested facts as demonstrated by both the opinion of the district court and the Court of Appeals below. (Pet. App. pp. 51a-60a; 62a-75a; 30a-50a). The undisputed facts essentially show that the positions at the heart of Petitioners' complaint were created in response to an independent, internal study of all positions (including salaries) with the School Board, as well as in an effort to resolve claims made by the United States Department of Justice ("DOJ") against the School Board relative to the placement of women in certain janitorial positions. 320 F.3d at 573, 574 (Pet. App. pp. 33a-35a).

The Consent Decree entered into between the School Board and the DOJ required that individuals employed in the part-time position of Janitor I (such as Petitioners) be given the first opportunity to apply for and be placed in the new full-time position of Janitor *if* they met the qualifications for employment in the new position.[2] 320 F.3d at 576 (Pet. App. p. 40a). The undisputed facts established that this was a new position, not simply a reclassification of an old one. Contrary to Petitioners' assertions, everyone who applied for the new position of Janitor (including Petitioners) was required to exhibit competency in performing certain manual tasks and to demonstrate an ability to read at the eighth grade level or higher before being offered employment in the position. 320 F.3d at 578 n.12 (Pet. App. p. 44a). Selection to serve in the new position of Janitor was based on the qualifications of the applicants and was not a "promotion" to which Petitioners "were entitled, either from years of service or job performance." 320 F.3d at 576 (Pet. App. p. 40a).

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2. The new position of Janitor for which Petitioners had the right of first refusal was a full-time position with benefits but was paid at a lower hourly salary than the old janitor position.

In accordance with its obligations under the Consent Decree, the School Board contacted Petitioners about their interest in applying for the new position and the majority indicated they would like to apply.[3] Petitioners were subsequently scheduled for the requisite testing and were the only ones to participate in the testing on that given day because of their right of first refusal for the job. 320 F.3d at 576 n.7 (Pet. App. pp. 40a-41a). All Petitioners who participated in the application process passed the "practical" test which was designed to evaluate their skills in operating equipment and in performing certain other required tasks. 320 F.3d at 573, 574 (Pet. App. pp. 34a-35a). Only one of the Petitioners, however, exhibited the ability to read on at least the eighth grade level. 320 F.3d at 574 (Pet. App. p. 35a).

Despite their respective reading levels, Petitioners were given the opportunity by the School Board to move into the new position of Janitor as long as they agreed to participate in adult education classes and retake the reading test at a later date. 320 F.3d at 574, 577 (Pet. App. pp. 35a, 42a). They were also told that, if they accepted the new position, they would be paid at the lowest step on the salary schedule for that position *until* such time as they demonstrated the ability to read at the eighth grade level; they would then be moved up the salary schedule to the step corresponding to that which Petitioner had occupied on the old janitor salary schedule. 320 F.3d at 574 (Pet. App. p. 36a). Petitioners were also given the right to choose whether they wanted to take the new position of Janitor under these conditions or remain in their old Janitor I job. *Ibid.* (Pet. App. p. 35a).

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3. At the time, Petitioners were all active employees of the School Board. Three employees, Bertha Twine, Amy Lane, and Dorothy Banks, indicated they did not wish to participate in the application process.

Petitioners thereafter filed suit against the School Board claiming, *inter alia*, that the School Board's action in creating the new position of Janitor (with its attendant salary schedule and employment criteria) was taken in retaliation against them because they had filed a lawsuit in June, 1993 against the School Board in Louisiana state district court. In the state court proceeding, the Petitioners alleged, *inter alia*, that the School Board had discriminated against them on the basis of their gender in violation of L.R.S. 23:1006 and L.R.S. 51:2231, *et seq.* (Louisiana's anti-discrimination statutes) when it reduced the number of hours per day that they worked (and their benefits) as part of a system-wide reduction in expenditures. Petitioners' claims were tried to the state court and, on November 30, 2000, were dismissed by the court with prejudice.[4] Petitioners chose not to appeal that judgment. 320 F.3d at 573 n.1 (Pet. App. p. 33a). In the case at hand, Petitioners' claims were ultimately dismissed on summary judgment by the district court. On appeal, the Fifth Circuit found that Petitioners (unlike others who applied for the new position of Janitor) were allowed to move into the new position regardless of their reading ability. 320 F.3d at 574 n.4 (Pet. App. pp. 35a-36a). It further found that the summary judgment evidence established that the School Board had complied with its obligations under the Consent Decree by allowing Petitioners the choice of (1) staying in their current position with no adverse consequences or (2) applying for and accepting employment in the new position with its attendant criteria. *Id.* at 577 (Pet. App. p. 41a).

In addition, the Court found that Petitioners had not shown that the School Board had coerced Petitioners into taking the new position or that the act of giving an employee a right of first refusal constituted an adverse employment action. *Ibid.* Given

4. Docket # 395,944, Div. "I" of the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

this, the Fifth Circuit held that the School Board's actions in creating "the new janitor position, for which [Petitioners] had a right of first refusal, did not constitute an ultimate employment decision because it did not affect [Petitioners'] job duties, compensation, or level of benefits as Janitor I employees." *Ibid.* (Pet. App. pp. 41a-42a).

## REASONS FOR DENYING THE PETITION

### I. Alleged Conflict As To The Proper Definition Of "Adverse Employment Action" For Purposes Of Establishing A Federal Retaliation Claim Is Not Determinative Of Issues In This Case.

Petitioners assert that the Fifth Circuit defines the term "adverse employment action" more strictly than the other courts of appeal and that, because of this, they were improperly denied the right to pursue their claims against the School Board. The fact is, however, that, despite the terms used by the circuits to define what constitutes an "adverse employment action", the circuits agree that there must be some action taken by an employer that results in an adverse change in the terms or conditions of the individual's employment before a cause of action exists pursuant to Section 704(a) of Title VII. *Banks*, 320 F.3d at 577 (employer's actions did not affect employees' job duties, compensation or level of benefits); *Vasquez v. County of L.A.*, 307 F.3d 884, 890 (9th Cir. 2002) ("disadvantageous changes in the workplace . . . constitute adverse actions, . . .); *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) ("What is necessary . . . is evidence that the challenged discriminatory acts . . . adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."); *Graham v. State Farm Mutual Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999) (plaintiff suffered no repercussions from actions of employer);

*Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (plaintiff must suffer an adverse employment action that affected the terms or conditions of employment); and *Torres v. Pisano*, 116 F.3d 625, 640 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997) (plaintiff has not shown she suffered a materially adverse change in the terms or conditions of employment).

That there may be a conflict among the circuit courts of appeals as to how to define an element of proof in a retaliation claim under Title VII (or other federal anti-discrimination law) is a non-issue in this case. No matter which definition is used, the actions complained of by Petitioners do *not* qualify as adverse employment actions sufficient to make out a *prima facie* case of retaliation.

The actions about which Petitioners complain consist of the creation of a new janitorial position together with a new salary schedule, as well as establishment of employment criteria for the new position. The School Board is hard pressed to see how these actions qualify as adverse to Petitioners when employment in the position was not promised to Petitioners nor were they entitled to employment in the position on the basis of experience or length of service. *Banks*, 320 F.3d at 576 (Pet. App. p. 40a). Instead, as found by the Fifth Circuit, the School Board allowed Petitioners the right of first refusal to move into the position regardless of their ability to meet the employment criteria for the job and then left the decision to the individual whether to take the new job or stay in the old one free from adverse consequences. 320 F.3d at 577 (Pet. App. p. 41a). *See Richardson v. New York State Dept. of Correctional Serv.*, 180 F.3d 426, 450 (2d Cir. 1999)

> While there is caselaw that quite properly holds that an involuntary transfer to a different job can be found by a trier of fact to have been an adverse employment decision, it hardly applies in circumstances

> where. . . . the employer offers the only job available, leaving the decision whether or not to transfer to the employee. (Internal citations omitted).

(Winter, Chief Judge, Dissenting).

In addition, Petitioners have not shown that the School Board was obligated to create the new position of Janitor absent its agreement with the DOJ. If the School Board had chosen to maintain the status quo, Petitioners could not claim that the actions of the School Board in so doing were adverse to them when there would have been no change in the terms, conditions and/or benefits of their employment. This is exactly the holding of the Fifth Circuit in this case: "Thus, the Board's implementation of the new Janitor position, for which [Petitioners] had a right of first refusal, did not constitute an ultimate employment decision because it did not affect [Petitioners'] job duties, compensation, or level of benefits as Janitor I employees." 320 F.3d at 577 (Pet. App. pp. 41a-42a). The "conflict" about which Petitioners make so much is inapplicable to this case.

In further support of the fact that the alleged conflict among the circuits is a non-issue herein, the School Board would show that a number of the cases cited by Petitioners in their Petition for Writ of Certiorari are inapposite to the issue they are attempting to create.[5] Specifically, the language cited by

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5. It is also interesting to note that this Court has previously denied certiorari in several of the cases cited by Petitioners in support of their argument. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001) (Pet. App. p. 15 n.16); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), *cert. denied*, 522 U.S. 997 (1997) (Pet. App. pp. 16-17); and *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 522 U.S. 932 (1997) (Pet. App. pp. 9-11).

Petitioners from *Vasquez*, *supra*, as evidence of the "conflict" among the circuits deals with the plaintiff's disparate treatment discrimination claim and not with the plaintiff's claim of retaliation. 307 F.3d at 890 (Pet. App. p. 14 n.15). The dismissal of Vasquez's retaliation claim was affirmed by the Ninth Circuit for failure to exhaust administrative remedies and for failure to show a genuine issue of material fact as to a causal connection between an "assumed" adverse action and the protected activity. *Id.* at 895-897.

In *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998), the Court determined that the plaintiff's complaints "considered collectively. . . . , *for judgment as a matter of law purposes*, . . . . satisf[y] the adverse employment action requirement for a prima facie case of retaliation." (Emphasis added.). Likewise, in *Richardson*, *supra*, the Court acknowledged that, while a jury might not find that the plaintiff had suffered from a "materially adverse change in the terms and conditions of her employment," the complaints were sufficient for purposes of summary judgment given that the defendant had failed to rebut same. 180 F.3d at 447.

Further, in *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994), the issue on appeal was whether the district court had properly granted the defendant's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Court found, after reviewing various actions found to constitute adverse employment actions, that the plaintiff's complaint on its face stated a claim for relief. 35 F.3d at 16. *See also Passer v. American Chemical Society*, 935 F.2d 322 (D.C. Cir. 1991) (reversal of 12(b)(6) motion to dismiss under ADEA).

Finally, in neither *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000) nor *Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir. 1996), was the Seventh Circuit dealing directly with the retaliation issue. In *Heuer*, the Court found that the plaintiff had not argued retaliation on appeal so she had waived that claim. 203 F.3d at 1023. In *Knox*, the Court was reviewing a jury instruction regarding retaliation and found the State had not properly objected to the instruction at trial so any objection was waived. 93 F.3d at 1333. The Court of Appeals went on to discuss the "adverse employment action" element of a claim for retaliation but, in both cases, that issue was not before the Court, therefore, the language discussing such is *dicta*. Petitioners' reference to these cases does not support their contention that, because of the "conflict among the circuits", writs should be granted herein.

## II. A Disagreement Between Federal Agencies As To The Appropriate Interpretation Of Federal Law Is Not An Adequate Basis For A Grant Of Writ Of Certiorari.

Petitioners argue that another basis for granting their Petition for Writ of Certiorari is the fact that the Department of Justice ("DOJ") and the Equal Employment Opportunity Commission ("EEOC") disagree on how the term "adverse employment action" should be defined in the context of a retaliation claim under Section 704(a) of Title VII. (Pet. App. pp. 21-27). Rule 10 of the Rules of the Supreme Court of the United States, while not exhaustive, does not list a conflict between federal agencies in the interpretation of a law as a basis for the granting of a writ of certiorari. If this Court began granting petitions for writ of certiorari every time there was a disagreement between two federal agencies, the Court's docket would soon become unmanageable.

In addition, a federal agency interpretation of a given law has only persuasive authority in the courts where Congress has not expressly invested that agency with the authority to promulgate rules and/or regulations governing the substantive provisions of that law. *Edelman v. Lynchburg College*, 535 U.S. 106, 122, 122 S. Ct. 1145, 1154, 152 L. Ed. 2d 188 (2002) (O'Connor, Justice, Concurring). *See also Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141, 142, 97 S. Ct. 401, 411, 50 L. Ed. 2d 343 (1976); and *Ray v. Henderson*, 217 F.3d 1234,1243 (9th Cir. 2000). Neither the EEOC nor the DOJ has been given that authority by Congress as regards Title VII. *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 257, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991); *Gilbert, supra*; and *Greenlees v. Eidenmuller Enters.*, 32 F.3d 197, 200 (5th Cir. 1994). The fact that there may be a conflict between the DOJ and the EEOC as to how to interpret Section 704(a) of Title VII is not sufficient grounds for the granting of a writ of certiorari given that the opinions of these two agencies on this issue do not have the "force of law." *Gilbert*, 429 U.S. at 141.

## III. The Decision Of The Fifth Circuit In *Banks* Does Not Conflict With This Court's Decision In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

Petitioners further argue that writs should be granted in this case because the decision of the Fifth Circuit conflicts with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). This contention also lacks merit.

The issue addressed by this Court in *Robinson* was who qualified as an employee under Section 704(a) of Title VII of the

Civil Rights Act of 1964. 519 U.S. at 339. The Court ultimately held that the term "employees" included both current and former employees for purposes of protection under that section. *Id.* at 346. There was no discussion regarding what qualifies as an "adverse employment action" for purposes of establishing a *prima facie* case of retaliation under Title VII.

Unlike *Robinson*, the decision of the Fifth Circuit in *Banks* did not turn on the issue of whether Petitioners were "employees" entitled to the protection of Section 704(a). At the time Petitioners were offered the opportunity to apply for the new position of Janitor, they were current employees of the School Board. The question presented to the Fifth Circuit in *Banks* was whether Petitioners had produced sufficient evidence to establish a genuine issue of material fact as to whether they had suffered an adverse employment action. This was not the issue in *Robinson*, and Petitioners' reference to it and reliance upon it is misplaced.

## CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari for all or any one of the following reasons, to wit, (1) the alleged conflict among the circuit courts of appeals was not determinative of the issues decided by the Fifth Circuit in *Banks*, *supra*, (2) the alleged conflict between the Department of Justice and the Equal Employment Opportunity Commission is not sufficient grounds for the grant of a writ, and (3) the Fifth Circuit's decision in *Banks*, *supra*, does not conflict with this Court's decision in *Robinson v. Shell Oil Co.*, *supra*.

Respectfully submitted,

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